

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

CARLTON EMBRY,

Defendant.  
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ORDER

07-cr-58-bbc

Defendant Carlton Embry has filed a motion for appointment of counsel and a request for an extension of time in which to file a motion for post conviction relief under 28 U.S.C. § 2255. Defendant was sentenced on January 28, 2009. He appealed his sentence to the court of appeals, which affirmed it on August 10, 2009. Defendant filed a petition for writ of certiorari with the Supreme Court. That petition was denied on January 15, 2010. Therefore, defendant has one year from January 15, 2010 or until January 15, 2011 in which to file his § 2255 motion.

Defendant understands that he has no right to a lawyer. It is within my discretion to appoint one for him but as a general rule, I do not appoint counsel on post-conviction motions until and unless the defendant has brought a motion that requires an evidentiary

hearing. Defendant is a long way from that point. He has not filed a motion or even identified an issue he wishes to raise. Accordingly, his motion for appointment of counsel will be denied.

As for defendant's motion for an extension of time in which to file his motion, that too will be denied. Although courts have the authority to accept petitions after the statutory one-year filing period has expired. Holland v. Florida, 130 S. Ct. 2549 (2010) (holding that one-year statute of limitations on petitions for federal habeas relief by state prisoners is not jurisdictional); see also United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000) ("Although the cases have not been as clear as they might have been, a close reading shows that we have consistently held that "2255's period of limitation is not jurisdictional but is instead a procedural statute of limitations subject to equitable tolling.") (citing Taliani v. Chrans, 189 F.3d 597 (7th Cir.1999)). However, "[e]quitable tolling of the statute of limitations is such exceptional relief that "we have yet to identify a circumstance that justifies equitable tolling in the collateral relief context." Modrowski v. Mote, 322 F.3d 965, 967 (7th Cir. 2003) (citing Lloyd v. VanNatta, 296 F.3d 630, 633 (7th Cir. 2002)).

The possibility that a defendant could obtain relief after a deadline has run does not mean that he can obtain prospective relief from the deadline simply because he fears he might not be able to prepare a motion before the deadline has run. Relief from the one-year filing period is available only to persons who can show that they have been pursuing their

rights diligently and that some extraordinary circumstance stood in their way. Holland, 130 S. Ct., at 2562.

Defendant still has 44 days in which to complete his § 2255 motion. If he works diligently, he should be ready to file it before January 15, 2011.

#### ORDER

IT IS ORDERED that defendant Carlton Embry's motion for appointment of counsel and his motion for an extension of time in which to file a motion pursuant to 28 U.S.C. § 2255 are DENIED without prejudice.

Entered this 2d day of December, 2010.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge